SUPREME COURT, U.S.
FILED
MAR 11 1993
OFFICE OF THE CLERK

No. 92-1097

In the Supreme Court of the United States

OCTOBER TERM, 1992

HARRY BARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether a defendant who is convicted in a single proceeding of multiple violations of 18 U.S.C. 924(c) is subject to the statute's provisions imposing a more severe sentence for "second or subsequent" convictions.

2. Whether the prosecutor impermissibly commented on petitioner's failure to testify.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Griffin v. *California*, 380 U.S. 609 (1965)	4
United States v. *Chan Yu-Chong*, 920 F.2d 594 (9th Cir. 1990)	6
United States v. *Herring*, 955 F.2d 703 (11th Cir.), certs. denied, 113 S. Ct. 353, 113 S. Ct. 503 and 113 S. Ct. 507 (1992)	5
United States v. *Nabors*, 762 F.2d 642 (8th Cir. 1985)	5, 6-7
United States v. *Percy*, 765 F.2d 1199 (4th Cir. 1985)	5
United States v. *Raynor*, 939 F.2d 191 (4th Cir. 1991)	4

Constitution and statutes:

U.S. Const. Amend. V	5
18 U.S.C. 924(c)	2, 4
18 U.S.C. 1952	2
21 U.S.C. 841(a)(1)	2
21 U.S.C. 843(b)	2
21 U.S.C. 846	2

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1097

HARRY BARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unpublished, but the judgment is noted at 976 F.2d 727 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1992. The petition for a writ of certiorari was filed on December 14, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; four counts of using a communications facility to facilitate the commission of a drug trafficking offense, in violation of 21 U.S.C. 843(b); two counts of interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952; three counts of possession and distribution of cocaine, in violation of 21 U.S.C. 841(a)(1); and two counts of using a firearm in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c). Petitioner was sentenced a total term of 444 months' imprisonment, which included a consecutive term of 60 months' imprisonment on his first Section 924(c) conviction and an additional consecutive term of 240 months' imprisonment on his "second or subsequent" Section 924(c) conviction. The court of appeals affirmed. Pet. App. 1a-12a; Gov't C.A. Br. 2, 24 n.10.

1. The evidence is summarized in the opinion of the court of appeals (Pet. App. 2a-4a). During 1988, petitioner regularly purchased cocaine and marijuana from co-defendant Harvey Raynor. After learning that Raynor had lost his principal supplier of cocaine, petitioner told Raynor that he knew of a "connection" in Florida who might be able to supply petitioner and Raynor with cocaine in distribution quantities. Once the "connection" was established, petitioner, Raynor, and their co-conspirators made four trips to Florida to purchase cocaine.

On the first of those drug-buying trips, petitioner flew to Florida, while Raynor and the other co-conspirators drove there. Petitioner asked Raynor to procure a firearm for him and transport it to Florida, since petitioner "couldn't fly with a gun." Raynor furnished petitioner a .38 caliber pistol, which petitioner carried with him while negotiating the terms of the initial drug purchase with one Bruce Bridges in Florida. Later, petitioner accompanied Bridges to the home of the Florida "connection," where petitioner received one kilogram of cocaine and delivered the purchase money. At that meeting, petitioner carried a .44 caliber magnum pistol. Raynor and the other co-conspirators transported the cocaine back to North Carolina, where petitioner received approximately eight ounces of the cocaine to distribute. Pet. App. 3a.

The three subsequent Florida trips followed a similar pattern. During two of those trips, petitioner carried a firearm while consummating the cocaine transactions. On the fourth trip, however, petitioner "got a little upset" upon learning that Raynor had neglected to bring a firearm for use during the drug transaction. Pet. App. 3a.

2. The court of appeals affirmed petitioner's convictions and sentence. In particular, the court held that the prosecutor did not impermissibly comment on petitioner's failure to testify (Pet. App. 4a-6a); that the prosecutor's improper reference during summation to the harmfulness of cocaine (Pet. App. 6a-8a) and his comments disparaging the trial tactics of defense counsel (Pet. App. 8a-10a) were harmless when viewed in the context of the trial as a whole; and that the prosecutor did not impermissibly vouch for

the credibility of various government witnesses by referring to the terms of their plea agreements with the government. Pet. App. 10a-12a. Although the issue was raised by petitioner (see Gov't C.A. Br. 24 n.10), the court of appeals' opinion did not address the propriety of imposing an enhanced 20-year sentence for a violation of 18 U.S.C. 924(c) where that "second or subsequent" violation is charged in the same indictment as the first. See Pet. App. 12a ("The remaining issue that [petitioner] raises on appeal does not warrant discussion."). The court of appeals had previously held that the enhanced 20-year sentence is applicable in those circumstances. See *United States* v. *Raynor*, 939 F.2d 191 (4th Cir. 1991).

ARGUMENT

1. Arguing that the sentence enhancement provision in 18 U.S.C. 924(c) applies only to "second or subsequent" convictions that occur after a conviction has been entered on a prior offense, petitioner contends (Pet. 8-12) that the court of appeals erred in sustaining the imposition of an enhanced penalty as a result of his second Section 924(c) conviction in the circumstances of this case. The issue that petitioner raises is presently pending before the Court in *Deal* v. *United States*, No. 91-8199 (argued Mar. 1, 1993). Accordingly, the petition in this case should be held and disposed of in light of the Court's resolution of *Deal*.

2. Petitioner further contends (Pet. App. 12-15) that the prosecutor violated the rule in *Griffin* v. *California*, 380 U.S. 609, 615 (1965), by improperly commenting on his failure to testify at trial. There is no merit to petitioner's claim. Before a prosecutorial

comment will violate the Fifth Amendment, it must be clear that "the language used [was] manifestly intended to be, or was . . . of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States* v. *Percy*, 765 F.2d 1199, 1204-1205 (4th Cir. 1985). Accord *United States* v. *Herring*, 955 F.2d 703, 709 (11th Cir.), certs. denied, 113 S. Ct. 353, 113 S. Ct. 503 and 113 S. Ct. 507 (1992); *United States* v. *Nabors*, 762 F.2d 642, 649-650 (8th Cir. 1985). The court of appeals correctly held that the arguments challenged by petitioner would not be understood by the jury as a comment on petitioner's failure to testify.

During closing argument, petitioner's counsel conceded the existence of evidence showing petitioner's repeated trips to Florida and linking petitioner to various co-conspirators. Petitioner's counsel contended, however, that petitioner's travel and meetings with co-conspirators merely reflected his efforts to solicit potential investors for legitimate oil business ventures. See Pet. App. 4a. In response, the prosecutor noted that the jurors "ha[d] just [now] witnessed" some of the tactics and strategies utilized by defense lawyers on television, and that "one tactic that's used often * * * is [that] you admit the obvious." Gov't C.A. Br. 12. The prosecutor then continued (*ibid.*) (emphasis added):

> [W]hat has [petitioner] done in this case? Well, the first thing he told you in his opening statement was yeah, I went on four trips. Of course he went on four trips because how's he going to get around that when the phone records

> and hotel records show that. So he's immediately got your mind off that and starts focusing on other things. . . .
>
> Now, isn't it interesting not so much what he did tell you but what he did not tell you. And let me ask you this. Who's really trying to fool whom here? You think about this awhile. You know he's down in Ocala, he's down in Orlando, he's down at Yeehaw Junction and you know that. You know that. And then he's back in North Carolina; he's on the phone. What is he doing? What is he down there for? *Why doesn't he just come out and say it?* . . . It's not so much what counsel has argued, it's what he hasn't brought out in this case that is significant.

As the court below correctly recognized, the emphasized portion of the prosecutor's rebuttal argument did "not * * * constitute improper comment on [petitioner's] refusal to testify." Pet. App. 6a. The prosecutor first used the pronoun "he" to refer to the arguments made by petitioner's counsel in his opening statement and, as the court of appeals noted, it could not have escaped the jury that petitioner "obviously[] did not make the opening statement" himself. *Ibid.* Given that context, the jury could only have understood the balance of the prosecutor's comments, including his use of the pronoun "he," to refer "to [petitioner's] attorney, or more specifically, the argument advanced by [petitioner's] attorney at trial." *Ibid.* The court of appeals correctly concluded that the prosecutor's rebuttal argument, aimed as it was at the claims made by defense counsel, was wholly proper. See *United States* v. *Chan Yu-Chong*,

920 F.2d 594, 598-599 (9th Cir. 1990); *United States* v. *Nabors*, 762 F.2d at 649-650. Further review of that factual conclusion is not warranted.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of in light of this Court's resolution of the identical issue in *Deal* v. *United States*, No. 91-8199; in all other respects it should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

ROBERT J. ERICKSON
Attorney

MARCH 1993